No. 1075

IN THE

Supreme Court of the United States

October Term, 1959

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

VULCANIZED RUBBER & PLASTICS COMPANY, *Petitioner*

v.

UNITED STATES OF AMERICA, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioner Vulcanized Rubber & Plastics Company, a corporation, respectfully prays that a *writ of certiorari* issue to review the final judgment of the United States Court of Appeals for the Third Circuit[1] entered in the above-entitled case on March 8, 1961, affirming a judgment entered on May 9, 1960 by the United States District Court for the Eastern District of Pennsylvania.[2]

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[1] Hereinafter referred to as the "Court of Appeals below."

[2] The certified copy of the record in the Court of Appeals below, which has been filed with the Clerk of this Court, is hereinafter referred to as "R.—, p.—."

OPINION BELOW

The opinion of the Court of Appeals below, *United States of America* v. *Vulcanized Rubber & Plastics Co.*, 288 F. 2d 257 (3 Cir. 1961), is printed in the Appendix to this Petition[3] (App., pp. 1a-10a).

JURISDICTION

The judgment of the Court of Appeals below was entered on March 8, 1961 (App., p. 11a).

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1), 62 Stat. 928.

QUESTIONS PRESENTED

1. Whether the United States, after a final ruling by the United States Court of Appeals for the District of Columbia Circuit

> that a cease and desist order of the Federal Trade Commission prohibiting Petitioner from designating combs manufactured by it as "rubber" or "hard rubber" does *not* "as written" prohibit Petitioner from designating such combs as "rubber-resin,"

may circumvent such ruling by the recovery of civil penalties from Petitioner in the Court of Appeals below on the ground

> that Petitioner's designation of its combs as "rubber-resin" is in violation of the *same* cease and desist order found by the United States Court of Appeals for the District of Columbia Circuit *not* by its terms to prohibit Petitioner's designation of its combs as "rubber-resin."

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[3] Hereinafter referred to as "App., p. —."

2. Whether the United States may recover civil penalties from Petitioner for the designation of combs manufactured by it as "rubber-resin" (a) without the issuance of a complaint charging that such designation is an unfair method of competition or unfair or deceptive act or practice in commerce, (b) without affording Petitioner an opportunity for a hearing on such complaint and (c) without the issuance of a cease and desist order prohibiting the use of such designation, all as required by Section 5(b) of the Federal Trade Commission Act, and (d) without affording Petitioner an opportunity for direct appeal from such order to an appropriate United States Court of Appeals as required by Section 5(c) of said Act.

STATUTE INVOLVED

The pertinent provisions of the Federal Trade Commission Act, as amended, 15 U.S.C. § 44 *et seq.* are printed in the Appendix to this Petition (App., pp. 14a-17a).

STATEMENT OF THE CASE

This Petition for a *writ of certiorari* involves a penalty suit under Section 5(l) of the Federal Trade Commission Act for alleged violation by Petitioner of a final cease and desist order issued by the Federal Trade Commission[1] under Section 5(b) of the Act.

Petitioner, whose offices are in Morrisville, Bucks County, Pennsylvania has for many years engaged in the manufacture, sale and distribution of combs in the national market. Until 1950, Petitioner made combs designated by it as "rubber" and "hard rubber" by the sulphur vulcanization method (R., Appellant's App., p. 49a). Under this method, rubber and sulphur are vulcanized under heat, resulting in a distinct and definite product known in the industry as "hard rubber" (R., Appellant's App., p. 16a).

[1] Hereinafter also referred to as the "Commission."

Late in 1950, Petitioner commenced to manufacture its combs from a patented compound containing 13% rubber and 85% resin.[3] This compound is manufactured by the United States Rubber Company under patents owned by it, and is sold to manufacturers under its trademarks, including "Kralastic" and "Royalite" (R., Appellant's App., p. 22a). This rubber-resin compound is more expensive than the rubber and sulphur used in the sulphur vulcanization method. Its advantage arises from its adaptability to the "injection molding" process (R., Appellant's App., p. 50a).

After adoption of the new method for the manufacture of combs, Petitioner continued to label its combs "rubber" and "hard rubber." The Federal Trade Commission issued a complaint under Section 5(b) of the Federal Trade Commission Act charging that Petitioner's designation of its combs as "rubber" and "hard rubber" constituted unfair methods of competition and unfair and deceptive acts and practices under the Act because its combs thus designated were not made by the sulphur vulcanization method which was previously utilized by Petitioner. After a hearing at which more than 3700 pages of testimony and approximately 200 exhibits were adduced, the Commission found that the term "rubber" and the term "hard rubber," as applied to combs, are words of art describing *only* combs made by the sulphur vulcanization method (R., Appellant's App., pp. 49a-56a); (App., p. 2a).

The sole issue raised by the Commission's complaint against Petitioner was whether Petitioner's combs made of a rubber-resin compound were entitled to be designated as "rubber" or "hard rubber" equally with combs made of the combination of sulphur and rubber by the process of

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[3] "This material is composed of approximately 13% nitrile rubber, 85% of hardening resin and small percentages of stabilizer and color" (Opinion of the Commission; R., Appellant's App., p. 49a).

vulcanization. No other term, designation or label of combs manufactured by Petitioner was before the Commission, and its decision was simply that the terms "rubber" and "hard rubber," when employed to designate combs, had acquired the unique meaning of combs manufactured by the sulphur vulcanization method.

The possible designation by Petitioner of its combs as "rubber-resin" never arose throughout the lengthy Commission hearing, since the hearing was directed exclusively to the determination of what was understood in the industry and by the consuming public as "rubber" and "hard rubber" when these designations are applied to combs. There is not now and there never was any dispute before the Commission during the hearing that the technical description of the compound of which Petitioner's combs are made is *rubber-resin*.[6]

The Commission issued a cease and desist order, following its findings concerning the designation of Petitioner's combs as "rubber" and "hard rubber," directing Petitioner to cease and desist from representing its combs as "rubber" or "hard rubber" unless such combs are in fact made of vulcanized hard rubber (R., Appellant's App., pp. 56a-57a). Petitioner filed a petition for review of the

[6] This was established by seven documentary exhibits referred to by the Hearing Examiner. Thus the Hearing Examiner states: "In Commission's Exhibit 68, the various types of Kralastic manufactured by Naugatuck Chemical [a division of U. S. Rubber Company] are referred to as '*rubber-resin* blends for molding and extrusion.' The same is true in Commission's Exhibit 69, another advertisement of the manufacturer." (Emphasis supplied) (R., Appellant's App., p. 21a). "In the numerous so-called Daly patents (Commission's Exhibits 21, 22, and 23, and Respondent's Exhibits 128 and 129), under which Kralastic D is manufactured by United States Rubber, the assignee of such patents, there is no claim that these patents will produce a hard rubber product but rather that they will produce a hard, tough, thermoplastic, homogeneous mixture of rubber and resin, a *rubber-resin* compound." (Emphasis supplied) (R., Appellants App., p. 47a).

Commission's order in the United States Court of Appeals for the District of Columbia Circuit. While the petition for review was pending, Petitioner submitted a compliance report, as required by Commission rules, advising the Commission of its intention to abandon the designation of its combs as "rubber" and "hard rubber" and to commence designating such combs as "rubber-resin." On November 1, 1957, the Commission advised Petitioner that it did not consider the designation of its combs as "rubber-resin" as satisfactory compliance with its order (R., Appellant's App., p. 62a).

Petitioner, faced with this subsequent interpretation by the Commission of its order, amended its pending petition for review in the United States Court of Appeals for the District of Columbia Circuit and informed that Court of the Commission's interpretation of its order. Petitioner took the position in that Court that the Commission's subsequent interpretation of its order exceeded the scope of the complaint, the evidence and the findings upon which the order was based, as well as of the order itself. Thereafter, in the proceeding before the United States Court of Appeals for the District of Columbia Circuit, Petitioner did not challenge the Commission's order as written, but contended that the Commission's subsequent interpretation of its order exceeded the terms and bounds of the order.

The United States Court of Appeals for the District of Columbia Circuit, on May 29, 1958, dismissed Petitioner's petition for review as presenting no justiciable controversy, and pointed out that the Commission's subsequent interpretation of its order "may be changed or it may never be enforced."[7] That Court did not, as requested by the Commission, affirm the Commission's order. The Commission thereafter continued to insist upon its

[7] *Vulcanized Rubber & Plastics Company* v. *Federal Trade Commission*, 258 F. 2d 684, 685 (D.C. Cir. 1958); (App., p. 13a).

disapproval of Petitioner's designation of its combs as "rubber-resin" and Petitioner continued to assert that such designation was not prohibited by the Commission's order.

The Commission issued no complaint against Petitioner's designation of its combs as "rubber-resin" and gave no opportunity for hearing before a hearing examiner on the lawfulness under Section 5(b) of the Federal Trade Commission Act of Petitioner's designation of its combs as "rubber-resin." Instead, the Commission brought a penalty suit against Petitioner under Section 5(l) of the Federal Trade Commission Act in a district court of the Third Circuit. This suit was instituted on April 7, 1959, approximately 11 months after the United States Court of Appeals for the District of Columbia Circuit had held that the Commission's subsequent interpretation of its order against Petitioner presented no justiciable controversy. The district court granted summary judgment for the Commission and imposed penalties upon Petitioner in the amount of $6,000 (R., Appellant's App., p. 78a).

Petitioner filed in the Court of Appeals below an appeal from the judgment of the district court. On March 8, 1961, a majority of the Court of Appeals below entered a judgment affirming the judgment of the district court (App., p. 11a). It is the affirmance by the Court of Appeals below of the judgment of the district court that is the basis for this Petition for a *writ of certiorari*.

REASONS FOR GRANTING THE WRIT

The decision of the Court of Appeals below should be reviewed because:

(1) The decision of the Court of Appeals below is in conflict with a final ruling of the United States Court of Appeals for the District of Columbia Circuit on the same matter, which ruled that a cease and desist order of the Federal Trade Commission prohibiting Petitioner from

designating combs manufactured by it as "rubber" or "hard rubber" does not prohibit Petitioner from designating such combs as "rubber-resin."

(2) The Court of Appeals below has sanctioned an unlawful departure by the district court from the plain requirements of the Federal Trade Commission Act, in that the Court of Appeals below has affirmed the imposition by the district court of civil penalties upon Petitioner under Section 5(l) of the Federal Trade Commission Act for the designation of combs manufactured by it as "rubber-resin" (a) without the issuance of a complaint by the Commission charging that such designation is in violation of Section 5(b) of said Act, (b) without affording Petitioner an opportunity for hearing on such complaint and (c) without the issuance of a cease and desist order prohibiting Petitioner from designating combs manufactured by it as "rubber-resin," all as required by Section 5(b) of said Act, and (d) without affording a respondent an opportunity for direct appeal from said order to an appropriate United States Court of Appeals as required by Section 5(c) of said Act.

The United States Court of Appeals for the District of Columbia Circuit correctly ruled that the Commission's cease and desist order does not prohibit Petitioner from designating its combs as "rubber-resin." The Commission's order was by its terms carefully and explicitly limited to prohibiting Petitioner from designating its combs as "rubber" or "hard rubber" unless such combs in fact are made by the process of vulcanization with sulphur. Throughout the extended hearing on the Commission's complaint before a hearing examiner of the Commission, Petitioner at all times freely conceded that its combs then designated as "rubber" or "hard rubber" were in fact not made by the process of vulcanization with sulphur.

After the Commission issued its order and while Petitioner's petition for review was pending in the United

States Court of Appeals for the District of Columbia Circuit, on direct appeal from the Commission's order, Petitioner informed the Commission that it intended to comply with the order by designating its combs as "rubber resin," in place of the prohibited designations "rubber" or "hard rubber."

The Commission, notwithstanding that its order was carefully and explicitly limited to prohibiting Petitioner from designating its combs as "rubber" or "hard rubber," informed Petitioner that it considered the designation "rubber-resin" as also prohibited by the order. (R., Appellant's App., p. 62a). Thereupon, petitioner, with leave of court, amended its petition for review in the United States Court of Appeals for the District of Columbia Circuit and asserted that the designation of its combs as "rubber-resin" was not prohibited by the Commission's order. That Court, after full argument, agreed with Petitioner that the Commission's subsequent interpretation of its order as prohibiting Petitioner from designating its combs as "rubber-resin" found no support in the order "*as written*" (App., p. 13a). Accordingly, that Court dismissed Petitioner's direct appeal on the ground "that there is no controversy calling for judicial review of the [Commission's] interpretation at the present time" (App., p. 13a).

The United States Court of Appeals for the District of Columbia Circuit pointed out that the Commission's "interpretation may be changed or it may never be enforced" (App., p. 13a). Clearly, if that Court had concluded that petitioner's designation of its combs as "rubber-resin" was a violation of the Commission's order as a matter of law, which was the conclusion the Commission unsuccessfully asked that Court to come to, that Court would have issued an order of affirmance of the Commission's order. Instead, it rejected the Commission's contention and dis-

missed Petitioner's appeal for lack of a justiciable controversy.[5]

As the Honorable Judge Hastie points out in his dissenting opinion in the Court of Appeals below, "Analytically, this unusual ruling [of the United States Court of Appeals for the District of Columbia Circuit] must have been based upon an intermediate conclusion that the order 'as written' did not make illegal the use of the designation 'rubber-resin' for the defendant's combs" since "obviously, if it did, the petition [for review] challenged the order 'as written'" (App., p. 9a).

It is no inadvertance on the part of the Commission that its order was limited to prohibiting Petitioner from designating its combs only as "rubber" or "hard rubber". As Judge Hastie points out in his dissenting opinion in the Court of Appeals below, the Commission's administrative proceeding against Petitioner's labeling of its combs "was solely concerned with and directed at the use of the designations of 'rubber' and 'hard rubber'" (App., p. 8a).

The hearing examiner stated in his initial decision that "this case has been entirely tried . . . upon the issues thereof which present the more limited question of whether respondent's combs . . . can properly be labeled and advertised as 'rubber' or 'hard rubber' combs" (R., Appellant's App., p. 10a). The hearing examiner stated, further, in his initial decision that "The gist of this proceeding is whether or not the representations of respondent in its advertising and labeling or branding of combs that are made of Kralastic D as 'Hard Ruber' or 'Rubber' are false, misleading and deceptive" (R. Appellant's App., p. 14a).

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[5] The Commission did not seek review in this Court of the refusal of the United States Court of Appeals for the District of Columbia Circuit to affirm its order.

The essence of the findings of the hearing examiner was "that the word 'rubber' when stamped or branded on a comb indicates that the same is a 'hard rubber' comb" and that the term "hard rubber" is properly used on a comb only when it is made by the process of vulcanization with sulphur (R. Appellant's App., pp. 17a-18a). Significantly, as Judge Hastie points out in his dissenting opinion in the Court of Appeals below, the designation "rubber-resin" is used *facio* by the hearing examiner in his initial decision, which was adopted by the Commission, to describe the material of which Petitioner's combs are in fact made (App., p. 8a; R., Appellant's App., pp. 21a-47a).

Moreover, as to a comb made of a "rubber-resin compound," which Petitioner's combs are in fact made of, the hearing examiner pointedly stated as to such a comb that "This is a far cry from any claim that it is 'hard rubber' or will produce a 'hard rubber' product . . ." (R., Appellant's App., p. 47a).

The majority opinion of the Court of Appeals below completely misconceives the nature of the Commission's complaint and the administrative proceeding thereon against Petitioner. It concludes that "The substitution of the compound word 'rubber-resin' for 'rubber' on a product which is not produced with the ingredients and *by the process held by the Commission to be the only recognized method to produce 'rubber'* is as much a violation of the Order as if defendant had continued to label its combs 'rubber'" (Emphasis supplied) (App., p. 7a).

The Commission did not in any respect hold or purport to hold that "the only recognized method to produce 'rubber'" is by the process of vulcanization with sulphur. As Judge Hastie succinctly puts it in his dissenting opinion in the Court of Appeals below, "The government's evidence indicated that the names 'rubber' and 'hard rubber' meant

and connoted [to purchasers of combs] vulcanized hard rubber and nothing else"[9] (App., p. 8a).

Petitioner is in agreement with the majority of the Court of Appeals below on one point, namely, that "The precise issue to be determined in this appeal [and also on this Petition] is whether the defendant [here Petitioner] by labeling its combs rubber-resin violated the Commission's cease and desist Order. *Federal Trade Commission* v. *Morton Salt Company*, 334 U.S. 37, 54 (1948)." (App., p. 4a). Petitioner is also in agreement with the majority of the Court of Appeals below that in framing a cease and desist order the Commission "cannot be *required* to confine its road block to the narrow lane the transgressor has traveled. . . ." (Emphasis supplied). *Federal Trade Commission* v. *Ruberoid Company*, 343 U.S. 470, 473 (1952).

The *Ruberoid* case, however, is no authority for "The precise issue" here. In that case, petitioner was attacking the *breadth* of the Commission's order, which was asserted to have gone too far. Here, though, Petitioner is attacking the Commission's order on the ground that it does not *include* a prohibition that the Commission by a subsequent interpretation seeks to read into the order. Petitioner does not contend that the Commission was *required* to confine its order solely to Petitioner's designation of its combs as "rubber" and "hard rubber"; but this is exactly what the Commission did. If the Commission had written its order originally, as it would now like to have it read, Petitioner would have had the opportunity for direct re-

[9] Judge Hastie also pointed out in this connection that "In the light of the matter actually litigated and the recognition by the hearing examiner that defendant's combs were in fact 'rubber-resin,' it is significant that in the Commission's order the words 'rubber' and 'hard rubber' are placed within quotation marks" and that "This is an additional indication that the proceeding was solely concerned with and directed at the use of the designations 'rubber' and 'hard rubber'" (App., p. 8a).

view on the merits of the order in the United States Court of Appeals for the District of Columbia Circuit. *Vulcanized Rubber & Plastics Company* v. *Federal Trade Commission*, 258 F. 2d 684 (D.C. Cir. 1958); (App., pp. 12a-13a).

Neither *United States* v. *Piuma*, 40 F. Supp. 119 (S.D. Cal. 1941), aff'd *sub nom. Piuma* v. *United States*, 126 F. 2d 601 (9 Cir. 1942) nor *In re Whitney & Company*, 273 F. 2d 211 (9 Cir. 1959) are apposite to "The precise issue" here. The *Piuma* case involved an order of the Commission that clearly by its terms prohibited *any* claim that Glendage "constitutes a remedy for glands." The case of *In re Whitney & Company*, which was a criminal contempt proceeding for violation of an order of the Commission under Section 2(c) of the Clayton Act, 15 U.S.C. § 13(c), dealt with the payment of unlawful discounts, which was clearly prohibited by the terms of the Commission's order. Neither case involved, as here, the attempt of the Commission to prohibit the designation of a product by a specific name, which correctly describes the composition of the product, on the basis of a construction of its order not appearing within the terms of the order "as written."[10]

The Court of Appeals below has sanctioned an unlawful departure by the district court from the jurisdictional requirements of the Federal Trade Commission Act for the imposition of civil penalties under Section 5(l) of said Act. Since the United States Court of Appeals for the District of Columbia Circuit has ruled, and correctly Peti-

[10] The majority opinion of the Court of Appeals below makes reference to *Arrow Metal Products Corporation* v. *Federal Trade Commission*, 249 F. 2d 83 (3 Cir. 1957) and *Masland Duraleather Co.* v. *Federal Trade Commission*, 34 F. 2d 733 (3 Cir. 1929). These cases are equally inapposite to "The precise issue" here. Both cases involve direct appeals from orders of the Commission that plainly embrace the designations in issue, "porcenamel" and "duraleather," respectively; and in both cases the Commission's order was found to have been based upon direct and adequate evidentiary findings in respect of the designations in issue.

tioner submits, that the Commission's cease and desist order here in issue does not by its terms prohibit Petitioner from designating its combs as "rubber-resin," it follows that the jurisdictional requisites for the imposition of civil penalties under Section 5(l) of the Federal Trade Commission Act are wholly lacking.

The Commission has sought the imposition of civil penalties against Petitioner for the designation of its combs as "rubber-resin" by circumvention[11] of the requirements of the Federal Trade Commission Act (a) for the issuance of a complaint charging a violation by Petitioner of Section 5(b) of this Act in respect of such designation of its combs, (b) for affording Petitioner an opportunity for hearing on such complaint, (c) for the issuance of a cease and desist order based upon a record of such hearing and (d) for an opportunity to Petitioner for direct judicial review of such an order.

The departure of the Commission in this case from its duties under the Federal Trade Commission Act substantially exceeds its departure from its duties under the Act in *Jacob Siegel Company* v. *Federal Trade Commission*, 327 U.S. 608 (1946). In the *Siegel* case, this Court struck down an order of the Commission prohibiting the designation of overcoats and topcoats as "Alpacuna," *not* on the ground that the Commission had failed to establish that the use of "Alpacuna" on such garments was deceptive but on the ground that the Commission had abused its discretion in concluding that only the excision of the name "Alpacuna" would avoid the deception. This Court held that failure of the Commission to consider whether any "qualifying language would eliminate the deception which it found lurking in the word Alpacuna" (at p. 613) was ground for reversal of the Commission's order.

[11] Significantly, Petitioner submits, the Commission did not seek the imposition of civil penalties against Petitioner in the district court of the District of Columbia Circuit but brought the penalty suit here in issue in a district court of another Circuit.

Unlike Petitioner's designation of its combs as "rubber-resin" in this case, the petitioner's designation of overcoats and topcoats as "Alpacuna" in the *Siegel* case was squarely before the Commission in an administrative proceeding which met all the requisites of Section 5 of the Federal Trade Commission Act; and the petitioner in the *Siegel* case was afforded opportunity for direct judicial review of the Commission's order in respect of "Alpacuna."

The decision of the majority of the Court of Appeals below would sanction the Commission's arbitrary and capricious procedure in attempting to circumvent the basic requirements of Section 5 of the Federal Trade Commission Act to prohibit Petitioner from designating combs manufactured by it as "rubber-resin," when such is the fact.

The completely indefensible and unwarranted position in which the Commission has placed Petitioner is forthrightly stated by Judge Hastie in his dissenting opinion in the Court of Appeals below, as follows:

> "Thus, the defendant is now in this position. It is held to have violated an order by using a label 'rubber-resin'—which under the ruling of the District of Columbia court was not forbidden by the order as written. Moreover, the defendant, which never had an opportunity before the Commission or on direct appeal from its order to have a hearing on the question whether the description 'rubber-resin' suggests some vulcanized hard rubber content or is otherwise deceptive, cannot have that issue litigated now because this is a collateral proceeding in which merely the meaning of the order, rather than its justification on the administrative record, can be litigated.
>
> "Administrative and judicial processes should not combine to impose such a dilemma upon a party. I see no way to solve this problem fairly except to hold that the ruling of the court below was inconsistent with the decision of the Court of Appeals for the District of

Columbia and, therefore, precluded by it. This would make it necessary for the Commission to challenge the defendant's use of 'rubber-resin' as deceptive in a new administrative proceeding, thus affording the defendant for the first time an opportunity to contest that issue." (App., pp. 9a-10a)

CONCLUSION

For the foregoing reasons, this Petition for a *writ of certiorari* should be granted.

Respectfully submitted,

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William F. Heefner
Attorneys for Petitioner

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 13,336

UNITED STATES OF AMERICA,

v.

VULCANIZED RUBBER & PLASTICS COMPANY, *Appellant*

Appeal from the United States District Court for the Eastern District of Pennsylvania

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Argued November 29, 1960

Before McLAUGHLIN, HASTIE and FORMAN, *Circuit Judges*.

Opinion of the Court

(Filed March 8, 1961)

By McLAUGHLIN, *Circuit Judge*.

This is an appeal from a summary judgment of the District Court for the Eastern District of Pennsylvania, awarding the United States civil penalties in the amount of $6,000 against Vulcanized Rubber & Plastics Company under Section 5(l) of the Federal Trade Commission Act as amended, 15 U.S.C.A. § 45(l), for violation of a cease and desist order issued by the Federal Trade Commission.

The facts are not in dispute. The defendant is a manufacturer of combs. Prior to 1950, defendant manufac-

tured all its combs by the sulphur vulcanizing method. Under this process rubber and sulphur are vulcanized under heat, resulting in a product recognized as "rubber" or "hard rubber" (hereafter both will be referred to as rubber). Until that time the defendant properly labeled its combs rubber. In 1950 defendant changed its manufacturing process to the injection mold type, which necessitated a change in the type of compound used to Kralastic D, a patented material made by the United States Rubber Company which was composed of approximately 13% nitrile rubber, 85% hardening resin and small percentages of stabilizer and color. Notwithstanding this change, the defendant continued to label its combs rubber. A complaint was instituted by the Federal Trade Commission and after extended hearings,[1] the following Cease and Desist Order was entered:

> "It is Ordered that respondent, Vulcanized Rubber & Plastics Company, a corporation, and its officers, agents, representatives, and employees, directly or through any corporate or other device, in connection with the offering for sale, sale and distribution in commerce, as 'commerce' is defined in the Federal Trade Commission Act, of any combs designed for use on human hair, to forthwith *cease and desist from representing, directly or by implication*, by any advertisement, packaging, labeling, branding, stamping, or other marking or indication *that such combs are 'rubber' or 'hard rubber' or made of 'rubber' or 'hard rubber' unless such combs are in fact made of vulcanized hard rubber.*" (Emphasis supplied).

A petition for review was then filed with the Court of Appeals for the District of Columbia. Prior to action thereon by that court, the defendant filed a compliance

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[1] The record of the hearings encompasses 3720 pages, together with approximately 200 exhibits.

report with the Commission stating that it would forthwith label its combs rubber-resin. The Commission rejected this. The defendant moved and was granted leave to amend its pending petition for review. This amendment informed the court of the Commission's interpretation and contended that it exceeded the bounds established by the complaint, findings and Order. In a per curiam opinion dismissing the petition for review, the court stated at 258 F.2d 685:

> "We do not understand the order *as written* to be challenged, but only the Commission's subsequent interpretation of its order. However, this interpretation may be changed or it may never be enforced. We hold that there is no controversy calling for judicial review of the interpretation at the present time."

Subsequently, the defendant filed another compliance report with the Commission, still asserting the right to label its combs rubber-resin. The Commission rejected this and instituted the present action for violation of the Order and recovery of civil penalties. The district court on cross motions for summary judgment found for the plaintiff and fixed the penalty at $6,000.[2] This appeal followed.

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[2] Since there was no issue of fact presented, the district court properly disposed of the case on summary judgment. We note, however, a prior case in the District Court for the District of New Jersey, United States v. Hindman, 179 F.Supp. 926 (D.N.J. 1960), where the court held an issue of fact was presented in the following circumstances. An action was brought to recover civil penalties under Section 5(*l*) of the Federal Trade Commission Act, as amended, 15 U.S.C.A. § 45(*l*). Under the Commission's Order, the defendant was directed to "cease and desist from representing, directly or indirectly: * * * that the military clothing offered for sale or sold, or any of it is custom made * * *." Subsequently, the defendant changed his label to read "custom-tailored." The court held at p. 928: "A jury trial will occur on the limited issue as to whether or not the label term 'custom-tailored' on defendant's

The precise issue to be determined in this appeal is whether the defendant by labeling its combs rubber-resin violated the Commission's cease and desist Order. Federal Trade Commission v. Morton Salt Co., 334 U.S. 37, 54 (1948).

Defendant's principal argument is that the labeling of its combs as being made of rubber-resin, does not fall within the scope of the Commission's Order. Necessarily defendant urges that the Order only prohibits it from labeling combs rubber, and that until there is a hearing by the Commission and a cease and desist order issued *specifically* prohibiting defendant from labeling its combs rubber-resin, an action for civil penalties cannot be maintained. We feel that the language of the order and the background of administrative hearings in this case completely refutes defendant's argument.

The Hearing Examiner found that the term rubber had a fixed and definite meaning. It was used to describe a distinct process whereby rubber and sulphur are vulcanized under heat. In the administrative proceeding, defendant contended that although the term rubber was recognized as being descriptive of those ingredients and that process, the term had acquired a secondary meaning broad enough to include defendant's product which did not contain sulphur, was not vulcanized and only contained a small percentage of nitrile rubber. The Hearing Examiner

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uniforms *means to their purchasers* that they are 'custom-made' ". (Emphasis supplied). The holding was erroneous, since the sole issue before the court was whether or not the labeling practice was within the proscription of the order and not whether the labeling practice was deceptive. United States v. Piuma, 40 F.Supp. 119, 122-123 (S.D. Cal. 1941), aff'd. sub nom, Piuma v. United States, 126 F.2d 601 (9 Cir. 1942). Moreover, creating an issue of fact as the court did in Hindman, would usurp the function exclusively vested by Congress in the Federal Trade Commission to determine the issue of whether a labeling practice is misleading or deceptive to the public.

disallowed this argument, and in his findings, which were adopted by the Commission, stated:

> "The gist of this proceeding is whether or not the representations of respondent in its advertising and labeling or branding of combs that are made of Kralastic D as 'Hard Rubber' or 'Rubber' are false, misleading and deceptive. It is found that they are false, misleading and deceptive as these combs are not made or composed of rubber or hard rubber but are made or composed in large part of materials other than rubber or hard rubber and do not contain any sulphur and are not made by the vulcanization process but are admittedly made by the injection mold or extrusion process."

The final Order drafted in light of the entire record, was designed to eliminate defendant's labeling practice both presently and in the future. Additionally, the Order not only prohibited the specific direct representations that the combs were made of rubber, but also prohibited any representation which "*by implication*" so represented the product "*unless such combs are in fact made of vulcanized hard rubber.*"[3] (Emphasis supplied). The labeling of the

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[3] The scope of the Order prohibiting direct as well as implied representations that the combs were made of rubber, was warranted by the record and consonant with the legislative objects of the Federal Trade Commission Act.

> "Orders of the Federal Trade Commission are not intended to impose criminal punishment or exact compensatory damages for past acts, but to prevent illegal practices in the future. In carrying out this function the Commission is not limited to prohibiting the illegal practice in the precise form in which it is found to have existed in the past. *If the Commission is to attain the objectives Congress envisioned, it cannot be required to confine its road block to the narrow lane the transgressor has traveled; it must be allowed effectively to close all roads to the prohibited goal, so that its order may not be by-passed with impunity.*" (Emphasis supplied). Federal Trade Commission v. Ruberoid Co., 343 U.S. 470, 473 (1951)

combs as being made of rubber resin falls within this latter proscription of the Order. United States v. Pinma, 40 F.Supp. 119 (S.D.Cal. 1941), aff'd sub nom. Pinma v. United States, 126 F.2d 601 (9 Cir. 1942); In re Whitney & Company, 273 F.2d 241 (9 Cir. 1959). It impliedly represents the combs to be made by a vulcanizing process which contains rubber and sulphur, when in fact the combs do not contain the ingredients nor are they produced by the process found by the Commission to be necessary to permit such labeling. Cf. Arrow Metal Products Corp. v. Federal Trade Com'n, 249 F.2d 83 (3 Cir. 1957); Masland Duraleather Co. v. Federal Trade Commission, 34 F.2d 733 (3 Cir. 1929).

In the Pinma case supra, the defendant was ordered to cease and desist from, among other things, representing *directly* or *indirectly* that his product was "a gland tonic" and that it was "the best gland remedy known." After a purported compliance by the defendant, the government instituted an action to recover civil penalties to which the defendant interposed the defense, inter alia, that he had changed certain language in the representation. The court made short shrift of the argument stating at p. 123:

> "The substitution of 'gland tablet' for 'gland tonic' or 'one of the best gland remedies known' for 'the best gland remedy known' does not materially change the nature of the representations."

In re Whitney & Company, supra, is another example of effective enforcement of a Commission cease and desist order. The Order prohibited Whitney from:

> "Paying or granting, directly or indirectly, to any buyer, anything of value as a commission or brokerage, or any compensation, allowance or discount in lieu thereof, upon purchases made for such buyer's own account."

The Order was affirmed by the Circuit Court of Appeals and that court directed compliance. Subsequently, Whitney sought to circumvent the Order by buying salmon for its own account at a price which contained a brokerage fee deduction and then reselling the salmon at a price which allowed as a discount, part of Whitney's brokerage fees. In holding this transaction was "an indirect grant of a discount in lieu of a commission or brokerage" and therefore violated the Order, the court stated at page 214:

> "The course followed by Whitney was a transparent attempt to circumvent the cease and desist order here in question. If persons subject to such orders were enabled to escape their effect by following such a course, these orders would be largely ineffective and unenforceable. *It was to preclude subterfuges of this kind that the orders here in question expressly forbade indirect as well as direct discounts in lieu of a commission or brokerage to persons buying for their own account.*" (Emphasis supplied).

Such is the situation in the case at bar. The defendant has attempted by a colorable compliance with the Commission's Order to frustrate its mandate. The substitution of the compound word "rubber-resin" for "rubber" on a product which is not produced with the ingredients and by the process held by the Commission to be the only recognized method to produce "rubber" is as much a violation of the Order as if defendant had continued to label its combs "rubber".

The judgment of the district court will be affirmed.

HASTIE, *Circuit Judge, dissenting.*

A restatement of the course of the administrative and judicial proceedings in this controversy is necessary to make clear the basis of my disagreement with the majority opinion.

Pursuant to an appropriate complaint, a hearing examiner of the Federal Trade Commission conducted a lengthy inquiry addressed to the question whether defendant Vulcanized Rubber & Plastics Co. was deceiving the public by labeling combs of its manufacture as "rubber" or "hard rubber" when the combs were in fact made of a patented compound containing 13% synthetic rubber, 85% resin and 2% coloring. The government's evidence indicated that the names "rubber" and "hard rubber" meant and connoted vulcanized hard rubber and nothing else. The compound used by defendant was described in its patent and in this proceeding as "rubber resin". Indeed, in the report of the hearing examiner, whose findings were adopted by the Commission, the designation "rubber resin" is used twice to describe the material of defendant's combs. There was not even an intimation in the record that such a designation was either inaccurate or deceptive. It was solely the use of the labels "rubber" and "hard rubber" which was challenged as misleading. Concluding that such designation would mislead the public, the Commission ordered the defendant to cease and desist "from representing, directly or by implication . . . that such combs are 'rubber' or 'hard rubber' or made of 'rubber' or 'hard rubber' unless such combs are of fact made of vulcanized hard rubber".

In the light of the matter actually litigated and the recognition by the hearing examiner that defendant's combs were in fact "rubber resin", it is significant that in the Commission's order the words "rubber" and "hard rubber" are placed within quotation marks. This is an additional indication that the proceeding was solely concerned with and directed at the use of the designations "rubber" and "hard rubber".

Such being the circumstances and the apparent coverage of the Commission's cease and desist order, the defendant, after receiving the order, apprised the Commis-

sion that it was complying with its mandate by designating and describing its combs as "rubber-resin". The Commission replied that it rejected this report and considered the designation "rubber-resin" a violation of its order.

The defendant then sought a judicial ruling on this controversy by filing its petition to review the cease and desist order.[1] In issue were the scope and effect of the order and whether the restraint it imposed was warranted by the complaint and record before the Commission. After hearing, the court filed a per curiam decision dismissing the appeal. *Vulcanized Rubber & Plastics Co. v. Federal Trade Commission*, D.C. Cir. 1958, 258 F.2d 684. In so doing it distinguished the Commission's "interpretation" from the order "as written", stated that defendant's quarrel was with the former rather than the latter, and refused to adjudicate that controversy. Analytically, this unusual ruling must have been based upon an intermediate conclusion that the order "as written" did not make illegal the use of the designation "rubber resin" for the defendant's combs. For obviously, if it did, the petition challenged the order "as written".

Thereafter, the Commission brought the present action in the Eastern District of Pennsylvania for civil penalties and obtained a decision that defendant's use of "rubber resin" violates the very order which the District of Columbia Court of Appeals had examined and found not even to have been challenged in the controversy over the use of "rubber-resin".

Thus, the defendant is now in this position. It is held to have violated an order by using a label "rubber resin"

[1] The amended petition for review alleged that the Commission's cease and desist order is arbitrary and capricious in that it prohibits petitioner from representing that rubber sold and distributed by it [illegible] are "rubber resin," when such is the fact. Opposing that position, the Commission did not distort the alleged coverage of the order, but rather defended the prohibition of the designation "rubber resin" as proper.

—which under the ruling of the District of Columbia court was not forbidden by the order as written. Moreover, the defendant, which never had an opportunity before the Commission or on direct appeal from its order to have a hearing on the question whether the description "rubber-resin" suggests some vulcanized hard rubber content or is otherwise deceptive, cannot have that issue litigated now because this is a collateral proceeding in which merely the meaning of the order, rather than its justification on the administrative record, can be litigated.

Administrative and judicial processes should not combine to impose such a dilemma upon a party. I see no way to solve this problem fairly except to hold that the ruling of the court below was inconsistent with the decision of the Court of Appeals for the District of Columbia and, therefore, precluded by it. This would make it necessary for the Commission to challenge the defendant's use of "rubber-resin" as deceptive in a new administrative proceeding, thus affording the defendant for the first time an opportunity to contest that issue.

Accordingly, I would reverse the decision of the District Court.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 13,336

UNITED STATES OF AMERICA

v.

VULCANIZED RUBBER & PLASTICS COMPANY, *Appellant*

On Appeal from the United States District Court for the Eastern District of Pennsylvania

Present: MCLAUGHLIN, HASTIE and FORMAN, *Circuit Judges.*

Judgment

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this case be, and the same is hereby affirmed.

Attest:

IDA O. CRESKOFF
Clerk

March 8, 1961

Received & Filed

Mar 8 1961

IDA O. CRESKOFF
Clerk

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 13986

VULCANIZED RUBBER & PLASTICS COMPANY, *Petitioner*

v.

FEDERAL TRADE COMMISSION, *Respondent*

On Petition to Review Order of the Federal Trade Commission

Decided May 29, 1958

Mr. Donald E. Van Kooghnet, with whom *Mr. H. Douglas Weaver* was on the brief, for petitioner.

Mr. E. K. Elkins, Attorney, Federal Trade Commission, with whom *Mr. James E. Corkey*, Assistant General Counsel, Federal Trade Commission, was on the brief, for respondent.

Before EDGERTON, *Chief Judge*, and FAHY and BURGER, *Circuit Judges*.

PER CURIAM: Petitioner seeks review of a Commission order to "cease and desist from representing . . . that [petitioner's] combs are 'rubber' or 'hard rubber' or are made of 'rubber' or 'hard rubber,' unless such combs are in fact made of vulcanized hard rubber." Over six months after the order had issued, the Commission undertook to construe its order, in a letter to petitioner, to prohibit representing the combs (which are 13% unvulcanized synthetic rubber and 85% plastic) as "rubber-resin." Petitioner contends that the order, as construed by the Commission, exceeds the bounds established by the

complaint and findings, citing *Gimbel Bros., Inc. v. Federal Trade Commission*, 116 F.2d 578 (2d Cir. 1941). We do not understand the order *as written* to be challenged, but only the Commission's subsequent interpretation of its order. However, this interpretation may be changed or it may never be enforced. We hold that there is no controversy calling for judicial review of the interpretation at the present time. See *Aetna Life Insurance Co. v. Haworth*, 300 U.S. 227 (1937).

Dismissed.

STATUTES INVOLVED

Federal Trade Commission Act, 15 U.S.C. § 45

PROCEEDING BY COMMISSION; MODIFYING AND SETTING ASIDE ORDERS

(b) Whenever the Commission shall have reason to believe that any such person, partnership, or corporation has been or is using any unfair method of competition or unfair or deceptive act or practice in commerce, and if it shall appear to the Commission that a proceeding by it in respect thereof would be to the interest of the public, it shall issue and serve upon such person, partnership, or corporation a complaint stating its charges in that respect and containing a notice of a hearing upon a day and at a place therein fixed at least thirty days after the service of said complaint. The person, partnership, or corporation so complained of shall have the right to appear at the place and time so fixed and show cause why an order should not be entered by the Commission requiring such person, partnership, or corporation to cease and desist from the violation of the law so charged in said complaint. Any person, partnership, or corporation may make application, and upon good cause shown may be allowed by the Commission to intervene and appear in said proceeding by counsel or in person. The testimony in any such proceeding shall be reduced to writing and filed in the office of the Commission. If upon such hearing the Commission shall be of the opinion that the method of competition or the act or practice in question is prohibited by sections 41-46 and 47-58 of this title, it shall make a report in writing in which it shall state its findings as to the facts and shall issue and cause to be served on such person, partnership, or corporation an order requiring such person, partnership, or corpoation to cease and desist from using such method of competition or such act or practice. Until the expiration of the time allowed for filing a petition for review, if no such petition has been duly filed within such time, or if a petition for review has been filed within such

time then until the record in the proceeding has been filed in a court of appeals of the United States, as hereinafter provided, the Commission may at any time, upon such notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any report or any order made or issued by it under this section. After the expiration of the time allowed for filing a petition for review, if no such petition has been duly filed within such time, the Commission may at any time, after notice and opportunity for hearing, reopen and alter, modify, or set aside, in whole or in part, any report or order made or issued by it under this section, whenever in the opinion of the Commission conditions of fact or of law have so changed as to require such action or if the public interest shall so require: *Provided, however*, That the said person, partnership, or corporation may, within sixty days after service upon him or it of said report or order entered after such a reopening, obtain a review thereof in the appropriate court of appeals of the United States, in the manner provided in subsection (c) of this section.

REVIEW OF ORDER; REHEARING

(c) Any person, partnership, or corporation required by an order of the Commission to cease and desist from using any method of competition or act or practice may obtain a review of such order in the court of appeals of the United States, within any circuit where the method of competition or the act or practice in question was used or where such person, partnership, or corporation resides or carries on business, by filing in the court, within sixty days from the date of the service of such order, a written petition praying that the order of the Commission be set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court to the Commission, and thereupon the Commission shall file in the court the record in the proceeding, as provided in section 2112 of title 28. Upon such filing of the petition the court shall have jurisdiction of the proceeding

and of the question determined therein concurrently with the Commission until the filing of the record and shall have power to make and enter a decree affirming, modifying, or setting aside the order of the Commission, and enforcing the same to the extent that such order is affirmed and to issue such writs as are ancillary to its jurisdiction or are necessary in its judgment to prevent injury to the public or to competitors pendente lite. The findings of the Commission as to the facts, if supported by evidence, shall be conclusive. To the extent that the order of the Commission is affirmed, the court shall thereupon issue its own order commanding obedience to the terms of such order of the Commission. If either party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the proceeding before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts, or make new findings, by reason of the additional evidence so taken, and it shall file such modified or new findings, which, if supported by evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of its original order, with the return of such additional evidence. The judgment and decree of the court shall be final, except that the same shall be subject to review by the Supreme Court upon certiorari, as provided in section 347 of Title 28.

* * * * * * * * * *

PENALTY FOR VIOLATION OF ORDER

(*l*) Any person, partnership, or corporation who violates an order of the Commission to cease and desist after it has become final, and while such order is in effect, shall forfeit and pay to the United States a civil penalty of not more than $5,000 for each violation, which shall accrue to the United States and may be recovered in a civil action brought by the United States. Each separate violation of such an order shall be a separate offense, except that in the case of a violation through continuing failure or neglect to obey a final order of the Commission each day of continuance of such failure or neglect shall be deemed a separate offense. * * *

SUPREME COURT, U. S.

FILED
JUL 6 1961
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No. 133

In the Supreme Court of the United States

OCTOBER TERM, 1961

VULCANIZED RUBBER & PLASTICS COMPANY,
PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. 1a-10a) is reported at 288 F. 2d 257.

JURISDICTION

The judgment of the court of appeals was entered on March 8, 1961 (Pet. App. 11a). The petition for a writ of certiorari was filed on June 6, 1961. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether an order of the Federal Trade Commission prohibiting petitioner from representing that its hair combs are made of "rubber" or "hard rubber" prohibits the representation that they are made of "rubber-resin."

STATUTE INVOLVED

The pertinent provisions of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45, are set forth in the appendix to the petition (Pet. 14a-17a).

STATEMENT

This is a proceeding brought by the United States under Section 5(l) of the Federal Trade Commission Act to recover statutory penalties for violation of a cease-and-desist order of the Federal Trade Commission. The District Court for the Eastern District of Pennsylvania found that the petitioner had violated the order and awarded penalties of $6,000 (Pet. 1a). The Court of Appeals for the Third Circuit (Judge Hastie dissenting) affirmed (Pet. 1a-10a).

The relevant facts are as follows:

Petitioner is engaged in the manufacture and sale of hair combs throughout the United States. In 1954 the Federal Trade Commission issued a complaint charging that petitioner had misrepresented that its combs, which were composed of approximately 13% synthetic latex and 85% hard plastic resin (and small percentages of stabilizer and color), were made of

rubber or hard rubber. After full administrative proceedings, the Commission held that the public understands that a "rubber" comb means one made of hard rubber; that hard rubber is made of sulphur and latex by the vulcanizing process; and that since petitioner does not use that process, its description of its combs as rubber or hard rubber was false and misleading. The Commission ordered petitioner to cease and desist from "representing, directly or by implication, * * * that [its] combs are 'rubber' or 'hard rubber' or made of 'rubber' or 'hard rubber' unless such combs are in fact made of vulcanized hard rubber" (Pet. 2a).

Petitioner sought review of that order in the Court of Appeals for the District of Columbia Circuit. It challenged the evidentiary support for the Commission's findings of misrepresentation, and contended that the order was arbitrary and capricious because it "prohibits the petitioner from representations that said combs * * * are 'resin rubber,' when such is the fact" (see Brief for Petitioner and Joint Appendix in Case No. 13,986, C.A.D.C., pp. 59-60).[1]

While the review petition was pending, petitioner submitted a compliance report to the Commission stating that it intended to describe its combs as "rubber-resin". On November 1, 1957 the Commission formally advised petitioner that it did not consider the use of the term "rubber-resin" as compliance with the order (R. 62a).[2] Petitioner then

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[1] A copy of this Brief and Joint Appendix have been lodged with the Clerk.

[2] "R." refers to the appellant's appendix in the court of appeals.

amended its petition for review to withdraw the claim that the Commission's findings were not supported by substantial evidence, and to add the new contention that the order was arbitrary and capricious because it prohibited petitioner "from representing that [its] combs are 'rubber-resin' when such is the fact". (Br. and Jt. App. in Case No. 13,986, C.A.D.C., pp. 73, 82). "Thereafter, in the proceeding before the United States Court of Appeals for the District of Columbia Circuit, Petitioner did not challenge the Commission's order as written, but contended that the Commission's subsequent interpretation of its order exceeded the terms and bounds of the order" (Pet. 6).

Faced with this situation, the court of appeals in a *per curiam* opinion unanimously dismissed the petition to review. 258 F. 2d 684 (Pet. 12a-13a). It held that petitioner had not challenged the order "*as written*," but "only the Commission's subsequent interpretation of its order" as prohibiting the representation that the combs are "rubber-resin"; and that since "this interpretation may be changed or it may never be enforced * * * there is no controversy calling for judicial review of the interpretation at the present time" (Pet. 13a).

Petitioner continued to use the term "rubber-resin" to describe its combs. At the request of the Commission, the United States, on April 7, 1959, instituted the present civil action for penalties for violating the cease-and-desist order (R. 2a-6a). On cross-motions for summary judgment, the district court held that petitioner had violated the order, and imposed a penalty of $6,000 (R. 72a-77a, 78a).

The court of appeals affirmed, holding that petitioner had violated the order by labelling its combs as "rubber-resin." (Pet. 1a-10a). The court pointed out (Pet. 4a) that the examiner (whose findings the Commission adopted) "found that the term rubber had a fixed and definite meaning. It was used to describe a distinct process whereby rubber and sulphur are vulcanized under heat." The court stated (Pet. 6a) that petitioner's description of its combs as rubber-resin "impliedly represents the combs to be made by a vulcanizing process which contains rubber and sulphur, when in fact the combs do not contain the ingredients nor are they produced by the process found by the Commission to be necessary to permit such labeling"; and that "[t]he substitution of the compound word 'rubber-resin' for 'rubber' on a product which is not produced with the ingredients and by the process held by the Commission to be the only recognized method to produce 'rubber' is as much a violation of the Order as if defendant had continued to label its combs 'rubber' " (Pet. 7a).

ARGUMENT

1. Petitioner's primary ground for seeking review is to resolve the alleged conflict between the decision below and that of the Court of Appeals for the District of Columbia Circuit in the earlier case (see *supra*, pp. 3-4) over whether the order prohibits representing that petitioner's combs are made of rubber-resin. Even if there were such a conflict, that would not warrant granting the writ, since the alleged disagreement between the two circuits is solely with

respect to the meaning of a particular Commission cease-and-desist order and does not involve any significant question of law. In any event, there is no conflict. For, as the Statement, *supra*, makes clear, the Court of Appeals for the District of Columbia Circuit, in dismissing petitioner's earlier review petition, plainly did not decide whether the use of the phrase "rubber-resin" fell within the prohibitions of the Commission's order. Its statement that it did "not understand the order *as written* to be challenged" (Pet. 13a), considered in the then posture of the review proceeding, merely reflected the fact hat petitioner had abandoned its attack on the findings. If, as petitioner now asserts, the District of Columbia Circuit had intended to rule that the Commission's order "as written" did not prohibit petitioner from designating its combs as "rubber-resin", it obviously would not have dismissed the case as premature.

2. Petitioner's other arguments are equally lacking in merit. The question whether the district court and the court of appeals correctly held that the Commission's order prohibits petitioner from designating its combs as "rubber-resin" involves only the scope of this particular order, and does not warrant further review by this Court. Petitioner's contention that the government should have instituted a new administrative proceeding under Section 5(b) of the Federal Trade Commission Act instead of filing the instant action under Section 5(l) for penalties is but another way of attempting to argue that the order does not prohibit use of the term "rubber-resin." For the Commission would be required to institute a

new proceeding only if the order as now drawn does not ban that phrase.

The issue in the penalty proceeding was whether petitioner's representations were prohibited by the order, not whether they were misleading. Petitioner could have litigated the validity of the Commission's order in the review proceedings before the District of Columbia Circuit, as it initially sought to do. But when petitioner abandoned in that court its attack upon the underlying findings and upon the order as written (see *supra*, pp. 3-4), it eliminated from this case any issue as to whether labeling combs not made by the vulcanizing process as "rubber-resin" was false and misleading. On the narrow question involved in the penalty proceeding—whether petitioner had violated the order—both courts below correctly ruled that it had.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JULY 1961.

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